SL 12 PAGE
DISTRIBUTED
AUG 29 1977

Nos. 76-6637 and 76-6767

AUG 29 1977
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

ORIGINAL COPY

CHLOE V. DAVIAGE, PETITIONER

v.

UNITED STATES OF AMERICA

FRANK R. SCOTT and BERNIS L. THURMON, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. McCREE, JR.,
Solicitor General,

BENJAMIN R. CIVILETTI,
Assistant Attorney General,

MICHAEL W. FARRELL,
ELLIOTT SCHULDER,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statement	2
Argument	6
Conclusion	11

CITATIONS

Cases:

Alderman v. United States, 394 U.S. 165	6, 7
Harrison v. United States, 392 U.S. 219	11
Massachusetts v. Painter, 368 F.2d 142, certiorari dismissed as improvidently granted, 389 U.S. 560	8
Sinmarco v. United States, 315 F.2d 669, certiorari denied, 374 U.S. 807	8
United States v. Armocida, 515 F.2d 29, certiorari denied sub nom. Conti v. United States, 423 U.S. 858	6, 8
United States v. Bishton, 463 F.2d 887	11
United States v. Bynum, 513 F.2d 533, certiorari denied, 423 U.S. 952	6, 7,
United States v. Chavez, 533 F.2d 491, certiorari denied, 426 U.S. 911	7, 9
United States v. Cooks, 493 F.2d 668, certiorari denied, U.S.	8
United States v. Cox, 462 F.2d 1293, certiorari denied, 417 U.S. 918	9
United States v. Daly, 535 F.2d 491, certiorari denied, 426 U.S. 911	7, 8, 10
United States v. De La Fuente, 548 F.2d 528	10
United States v. Fury, 554 F.2d 522, certiorari pending, No. 76-6828	7, 10
United States v. Hinton, 543 F.2d 1002, certiorari denied sub nom. Carter v. United States, No. 76-582, November 29, 1976	7
United States v. Jackson, 549 F.2d 517	10
United States v. James, 494 F.2d 1007, certiorari denied, 419 U.S. 1020	4, 5, 9
United States v. Kalustian, 529 F.2d 585	10
United States v. Landmesser, 553 F.2d 17	10
United States v. Lee, 308 F.2d 715	8
United States v. Manfredi, 488 F.2d 588, certiorari denied, 417 U.S. 936	9
United States v. Poeta, 455 F.2d 117, certiorari denied, 406 U.S. 948	7
United States v. Pacheco, 489 F.2d 554, certiorari denied, 421 U.S. 909	10
United States v. Quintana, 508 F.2d 867	7, 8, 9
United States v. Ramsey, 503 F.2d 524, certiorari denied, 420 U.S. 932	7
United States v. Robinson, 414 U.S. 218	8
United States v. Sarvis, 523 F.2d 1177	11
United States v. Scibelli, 549 F.2d 222, certiorari denied, No. 76-1212, June 6, 1977	10
United States v. Scully, 546 F.2d 255, certiorari denied, No. 76-5918, April 18, 1977	6
United States v. Spagnuolo, 549 F.2d 705	10
United States v. Welsh, 446 F.2d 220	8

Statutes:

18 U.S.C. 1403	2
18 U.S.C. 2518	9
18 U.S.C. 2518(5)	3, 7
26 U.S.C. 4704(a)	2
26 U.S.C. 4705(a)	2
26 U.S.C. 7237(b)	2

Miscellaneous:

S. Rep. No. 1097, 90th Cong., 2nd Sess. (1968)	6

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 76-6637

CHLOE V. DAVIAGE, PETITIONER

v.

UNITED STATES OF AMERICA

No. 76-6767

FRANK R. SCOTT and BERNIS L. THURMON, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The initial opinion of the district court (Pet. App. A13-A29)[1] is reported at 331 F. Supp. 233. The first opinion of the court of appeals (Pet. App. A30-A35) is reported at 504 F. 2d 194. The district court's findings and conclusions on remand (Pet. App. A36-A43) are unreported. The second opinion of the court of appeals (Pet. App. A44-A53) is reported at 516 F. 2d 751. The order of the court of appeals denying rehearing en banc (together with a dissenting opinion) (Pet. App. A54-A55) is reported at 522 F. 2d 1333. The opinion of the court of appeals affirming petitioners' convictions (Pet. App. A7-A12) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 29, 1977. The Chief Justice extended the time for filing a petition for a writ of certiorari in No. 76-6767 to and including May 28, 1977. The petitions for a writ of certiorari were filed on April 27, 1977 (No. 76-6637) and May 19, 1977 (No. 76-6767). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

1/ Unless otherwise noted, "Pet. App." references are to the appendix in petition No. 76-6637.

QUESTIONS PRESENTED

1. Whether, in the court-authorized electronic surveillance of an extensive narcotics operation, the government failed to minimize the interception of irrelevant conversations although a particularized analysis of the intercepted calls showed that it was reasonable to intercept all of them.

2. Whether the affidavit supporting the government's application for an interception order adequately set forth the reasons why normal investigative procedures were unlikely to succeed or too dangerous to undertake (No. 76-6637).

3. Whether petitioners were denied their right to a speedy trial.

STATEMENT

Following a nonjury trial on stipulated facts in the United States District Court for the District of Columbia, petitioner Daviage was convicted of using a telephone to violate federal narcotics laws, in violation of 18 U.S.C. 1403; petitioner Scott was convicted of the sale or purchase of narcotics not in the original stamped package, in violation of 26 U.S.C. 4704(a); and petitioner Thurmon was convicted of conspiracy to sell narcotics, in violation of 26 U.S.C. 7237(b) and 4705(a). Petitioners Scott and Thurmon were each sentenced to ten years' imprisonment; petitioner Daviage was sentenced to three years' imprisonment, all but six months of which was suspended, to be followed by three years' probation. The court of appeals affirmed (Pet. App. A7-A12).[1]

1. The charges of which petitioners were convicted were based upon evidence derived from court-authorized electronic surveillance conducted in January 1970, pursuant to a judicial order authorizing federal and local law enforcement officials to intercept wire communications of petitioner Thurmon, co-conspirator "Alphonso

1/ The statutes under which petitioners were convicted were repealed in connection with the enactment of the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. 91-513, 84 Stat. 1292.

H. Lee,"[2] and others unknown, over a telephone listed in the name of "Geneva Thornton"[3] and located at premises on N Street in Washington, D.C. The order authorized the monitoring agents to intercept conversations relating to a conspiracy illegally to import and distribute narcotics, and, as required by 18 U.S.C. 2518(5), directed that the monitoring be conducted in such a way as to minimize the interception of innocent conversations (Pet. App. A31). The interceptions occurred between January 25 and February 24, 1970.[4]

The monitoring agents intercepted and recorded in their entirety all of the 384 completed in-coming and out-going calls made during the thirty-one day period of electronic surveillance on

2/ Albert Lee, a/k/a "Alphonso H. Lee," named in the interception order, subsequently was indicted and convicted together with petitioners. His appeal is now pending in the court of appeals (No. 76-1092).

An affidavit accompanying the application for the interception order explained that normal investigative techniques, including reliance on a reliable informant who had been employed by Lee in the retail distribution of drugs, had been unsuccessful in revealing the identity of a "silent partner" in Lee's narcotics operation, and had failed to uncover the operation's source of supply, as well as the "factory" where the narcotics were "cut" and packaged. According to informants, the conspirators had avoided physical surveillance through careful selection of purchasers and sellers, frequent changes in meeting places, and the use of motorcycles by messengers. The affidavit also noted that Lee was extremely cautious, appeared to be constantly on the alert for law enforcement surveillance, and varied his pattern of activities in order to avoid detection.

Telephone toll records had been obtained in an effort to trace the bounds of the conspiracy. The agents believed, however, that many of Lee's dealings were conducted through local telephone calls that would not be noted on the toll records.

We have lodged a copy of the affidavit with the Clerk of this Court.

3/ "Geneva Thornton" was an alias used by Geneva Jenkins, a co-defendant in this case (Pet. App. A31, n. 1).

4/ While the intercept application requested authorization to conduct the interception for a twenty-day period, through a typographical error the order authorized interception for thirty days. The original order was only executed for twenty days, however, and on February 13, 1970, an application for an eleven-day extension of the intercept was approved (Pet. App. A32, n. 3).

Between February 4 and February 24, 1970, pursuant to judicial orders, government agents intercepted conversations of the conspirators over two other telephones, located at 5195 Linnean Terrace in Washington, D.C. The record contains no evidence concerning the manner in which these interceptions were conducted, and they are not at issue here.

the telephone at the N Street premises.[5] The agents were instructed not to listen to or record "privileged conversations," such as those between attorney and client, but no such calls were monitored and thus the opportunity to minimize in this respect never arose (Pet. App. A48-A49, n. 9).

2. Petitioners and eleven co-defendants were indicted on June 24, 1970. Extensive discovery and numerous defense motions followed. On April 29, 1971, the district court granted a defense motion to suppress the intercepted conversations, ruling that the monitoring agents had failed to minimize the interceptions of innocent conversations (Pet. App. A26-A28). The court noted that all conversations were intercepted in their entirety, and that written reports that were submitted by the monitoring agents to the authorizing judge during the execution of the interception characterized 40% of the intercepted calls as narcotics related and the remainder as non-narcotics related (Pet. App. A27, A34).

The government moved for reconsideration and, as an aid to judging the reasonableness of the interceptions, presented a "call analysis" consisting of a breakdown of the intercepted conversations into various categories (Pet. App. A35). The district court denied the motion for reconsideration without opinion on June 25, 1971.

The government appealed. After extensive briefing by both sides the case was argued in the court of appeals on December 19, 1972. That court deferred its decision pending its disposition of the already pending appeal in United States v. James, 494 F. 2d 1007 (C.A.D.C.), certiorari denied, 419 U.S. 1020, which also presented the issue of minimization (Pet. App. A10-A11, A31, A46).

On June 27, 1974, the court of appeals vacated the suppression order and remanded the case for an assessment of the reasonableness of the monitoring agents' conduct "on a considerably more particularized basis" (Pet. App. A34) than that previously made by the district court.

5/ At one point during this period the agents ceased the interceptions when they realized that their equipment was connected to the wrong telephone line (Pet. App. A48-A49, n. 9).

The court ruled that the fact that 60% of the intercepted conversations ultimately proved to be non-narcotics related did not necessarily mean that the monitoring agents had acted unreasonably in intercepting them at the time (Pet. App. A34-A35). It directed the district court "to accept the [government's] call analysis and any other evidence that might appear to be of assistance in the resolution of this complicated minimization question" (Pet. App. A35), and to reassess the reasonableness of the agents' conduct in light of the court of appeals' intervening decision in United States v. James, supra.[6/]

Following evidentiary hearings on remand, the district court again ordered the calls suppressed. The court found no errors in classification in the government's call analysis, but reiterated its view that total interception of all conversations was unlawful, declaring that the monitoring agents' "conduct would be unreasonable, even if every intercepted call were narcotics related" (Pet. App. A42).

On expedited appeal, the court of appeals (on July 25, 1975), after noting the lengthy period that had elapsed since the commission of the offenses in question, undertook its own review of the intercepted conversations (Pet. App. A46). It ruled (Pet. App. A51) that there was "no category of conversations which would have required the institution of a minimization procedure by the monitoring agents, and appellants have identified none* * *." The court accordingly concluded (ibid.) that, "under the particular facts of this case," the extent of surveillance was not unreasonable. It therefore reversed the suppression order and remanded the case to the district court with the suggestion that petitioners and their co-defendants be brought to trial as quickly as possible (Pet. App. A46, A53). Two weeks later petitioners filed a petition for rehearing with a suggestion for rehearing en banc, which was denied on October 3, 1975 (Pet. App. A54). Petitioners then filed a petition for a writ of

6/ In James, the court of appeals enunciated several factors to be weighed in judging compliance with the statutory minimization requirements, including (a) the scope of the criminal enterprise involved, (b) the extent to which the subject telephone was being utilized in the illicit activity, (c) the government's expectation as to the contents of the calls, and (d) the extent of judicial supervision exercised over the execution of the wire intercept (494 F. 2d at 1019-1021).

certiorari on November 3, 1975, which was denied by the Court on April 5, 1976 (425 U.S. 917; Pet. App. A56).

Upon remand to the district court, petitioners moved to dismiss the indictments on the ground that they had been denied their right to a speedy trial. This motion was denied and, on July 12-14, 1976, they were tried before the court on stipulated evidence (Pet. App. A8).

ARGUMENT

1. Petitioners contend that in executing the surveillance order the monitoring agents did not adequately minimize the interception of innocent conversations.

a. Although each petitioner was overheard during the execution of the order, only petitioner Thurmon was a party to intercepted communications that were non-narcotics related (Pet. App. A32). Accordingly, only he has standing to seek suppression on the ground that the government failed to minimize the interceptions. All of the intercepted calls to which petitioners Daviage and Scott (who were not subscribers to the monitored telephone) were parties related to the conspiracy to distribute narcotics, and hence they lack standing to raise the minimization issue.

In enacting Title III of the Omnibus Crime Control and Safe Streets Act of 1968, Congress did not intend to grant broader standing to challenge assertedly illegal governmental intrusions than is conferred by the law of search and seizure generally.[7/] See S. Rep. No. 1097, 90th Cong., 2nd Sess. 91, 106 (1968); Alderman v. United States, 394 U.S. 165, 175-176 n. 9; United States v. Scully, 546 F. 2d 255, 268 (C.A. 9), certiorari denied, No. 76-5918, April 18, 1977; United States v. Armocida, 515 F. 2d 29, 35 n. 1 (C.A. 3), certiorari denied sub nom. Conti v. United States, 423 U.S. 858; United States v. Bynum, 513 F. 2d 533, 534-535 (C.A. 2), certiorari denied, 423 U.S. 952.

7/ Indeed, although it rejected the government's standing argument, the court of appeals recognized that Congress intended to keep the statutory suppression remedy within the scope of traditional search and seizure law (Pet. App. A33).

Thus, since "Fourth Amendment rights are personal rights which * * * may not be vicariously asserted" (Alderman v. United States, supra, 394 U.S. at 174), petitioners Daviage and Scott may not urge suppression on account of alleged misconduct that did not violate their rights. See United States v. Fury, 554 F. 2d 522, 526 (C.A. 2), certiorari petition pending, No. 76-6828; United States v. Hinton, 543 F. 2d 1002, 1011-1012 n. 13 (C.A. 2), certiorari denied sub nom. Carter v. United States, 429 U.S. 980; United States v. Ramsey, 503 F. 2d 524, 532 (C.A. 7), certiorari denied, 420 U.S. 932; United States v. Poeta, 455 F. 2d 117, 122 (C.A. 2), certiorari denied, 406 U.S. 948.

b. The court of appeals correctly rejected petitioners' minimization claims. In its second opinion in this case, it noted that the minimization requirement of 18 U.S.C. 2518(5) does not require the monitoring agents to decide whether to terminate interception of each individual conversation. Instead, "the only feasible approach to minimization is the gradual development, during the execution of the particular wiretap order, of categories of calls which most likely will not produce information relevant to the investigation. * * * Until such categories become reasonably apparent, however, interception of all calls will be justified under the wiretap authorization" (Pet. App. A47-A48; footnote omitted). Accord, United States v. Daly, 535 F. 2d 434, 440-442 (C.A. 8); United States v. Chavez, 533 F. 2d 491, 494 (C.A. 9), certiorari denied, 426 U.S. 911; United States v. Quintana, 508 F. 2d 867, 873 (C.A. 7). The court then carefully analysed the calls intercepted and concluded that, on the particular facts of this case, no such categories of innocent conversations had appeared, and thus that the agents did not act unreasonably in intercepting all of the conversations (Pet. App. A51).[8/] There is no

8/ The court found that petitioners were involved in a relatively extensive narcotics business; that the conspirators used coded language and occasionally discussed irrelevant matters at the outset of a narcotics-related conversation; that the subject telephone was heavily used in the narcotics business; that in the course of the interception the agents discovered that the operation was different in nature (though not lesser in scope) than originally believed; and that the authorizing judge was given periodic reports concerning the number of calls intercepted and the number of those which were narcotics-related (Pet. App. A51-A52).

need for further review by this Court of this essentially factual determination.[9/]

Petitioner Daviage argues that the court of appeals rendered the subjective intent and possible "bad faith" of the agents in failing to minimize completely irrelevant and thus created a conflict among the circuits (Pet. No. 76-6637, pp. 7, 9-10). We disagree with both claims.

The court below did not make the agents' intent irrelevant. On the contrary, it expressly stated that intent "is undoubtedly one factor to be considered in assessing whether the minimization requirement has been satisfied" (Pet. App. A49), and that, while the objective reasonableness of the interceptions is the decisive factor, the subjective intent of the agents is nonetheless relevant, since if the agents fail to manifest a high regard for the right of privacy the government will "have a heavier burden of showing that the interceptions were reasonable" (Pet. App. A49, n. 12).[10/]

The court's emphasis on the objective facts surrounding the actual interceptions in determining whether the minimization standards have been met is entirely consistent with the analysis of other courts of appeals that have considered this issue. See United States v. Daly, supra; United States v. Armocida, supra; United States v. Quintana, supra; United States v. Bynum, supra. Petitioners point to no decision of any court of appeals that concludes that there has been a failure to minimize because of the agents' intent to listen to all calls when such total interception was reasonable, and we are aware of none. Indeed, in at least six cases other than the present one, interception of all or nearly all calls was held

9/ Moreover, because the court of appeals directed issuing judges to require reports concerning efforts to minimize in orders issued hereafter (Pet. App. A52-A53), the issue is not likely to be a recurring one, at least in the District of Columbia Circuit. See note 11, infra.

10/ This focus on the objective reasonableness of what has occurred represents the better view in traditional search and seizure analysis: the Fourth Amendment's proscription against unreasonable searches and seizures is violated not by attitudes but by actions. See United States v. Robinson, 414 U.S. 218; Sinmarco v. United States, 315 F. 2d 669 (C.A. 10), certiorari denied, 374 U.S. 807; United States v. Welsh, 446 F. 2d 220 (C.A. 10); United States v. Lee, 308 F. 2d 715 (C.A. 4). But see Massachusetts v. Painter, 368 F. 2d 142 (C.A. 1), certiorari dismissed as improvidently granted, 389 U.S. 560; United States v. Cooks, 493 F. 2d 668 (C.A. 7), certiorari denied, 420 U.S. 996. We submit

(continued)

not to have violated the minimization requirement. See United States v. Chavez, supra; United States v. Quintana, supra; United States v. Bynum, supra; United States v. James, supra; United States v. Manfredi, 488 F. 2d 588 (C.A. 2), certiorari denied, 417 U.S. 936; United States v. Cox, 462 F. 2d 1293 (C.A. 8), certiorari denied, 417 U.S. 918.[11/]

2. Contrary to petitioner Daviage's claim (Pet. No. 76-6637, pp. 8-9, 12-14), the courts below correctly concluded (Pet. App. A24, A32, A8 n. 1) that the affidavit supporting the intercept application in this case presented the authorizing judge with a sufficient factual basis to warrant his conclusion that normal investigative techniques had been tried and had failed or were unlikely to succeed.

The affidavit (see note 2, supra) stated that the government had attempted physical surveillance, but that the conspirators had avoided detection in many instances by varying their pattern of activities and by careful selection of purchasers and sellers. The acquisition by the government of telephone toll records (which list long distance calls made at a particular number) did not provide law enforcement officials with information concerning the local aspects of the operation. Furthermore, although a reliable informant had infiltrated the conspiracy at the retail level, he was unable to provide information regarding the source of the drugs, the location of the "factory" where the drugs were prepared for distribution, and the identity of a reputed "silent partner" in the operation.

On the strength of these facts, the issuing judge "could have reasonably determined that the individuals being investigated were acting cautiously, were sensitive to the potential of a police

10/ (continued) that the purpose of the Amendment, and of the minimization requirement of Title III as well, is to curb unreasonable searches not to suppress improper desires. For that reason, reliance by the court of appeals on the government's call analysis was clearly proper, since it served to illuminate the objective reasonableness of the overhearings.

11/ Petitioners' fears that this case portends a weakening of the statutory requirements of minimization is refuted by the court of appeals' directive to the district court (Pet. App. A52-A53) that

> * * * in issuing orders under 18 U.S.C. § 2518 in the future, courts should include a provision requiring that periodic reports to the supervising judge specifically include statements on attempts to minimize. This will guarantee that the uncertainties in this record are not duplicated in future cases and will further the intent of Congress.

(continued)

investigation and that the full scope of the criminal conspiracy, if it existed, could not be determined except by means of electronic surveillance." United States v. Fury, supra, 554 F. 2d at 529.

The court of appeals are generally in agreement that, "[i]n enacting Title III, Congress did not require the exhaustion of 'specific' or 'all possible' investigative techniques before wiretap orders could issue." United States v. Jackson, 549 F. 2d 517, 537 (C.A. 8). Accord, United States v. Fury, supra, 554 F. 2d at 530; United States v. Scibelli, 549 F. 2d 222, 226 (C.A. 1), certiorari denied, No. 76-1212, June 6, 1977; United States v. Spagnuolo, 549 F. 2d 705, 710 (C.A. 9); United States v. DeLa Fuente, 548 F. 2d 528, 537-538 (C.A. 5); United States v. Daly, supra, 535 F. 2d at 438.[12/] The purpose of the statutory requirement is "to inform the issuing judge of the difficulties involved in the use of conventional techniques." United States v. Pacheco, 489 F. 2d 554, 565 (C.A. 5), certiorari denied, 421 U.S. 909. Here, the affidavit set forth in sufficient detail a description of the traditional techniques that had been employed in this case yet had failed to uncover the full scope of the conspiracy. The issuing judge therefore was sufficiently informed to be able properly to conclude that resort to wire interceptions was appropriate.

3. Petitioners contend (Pet. No. 76-6637, pp. 14-16; Pet. No. 76-6767, pp. 9-10) that the pre-trial delay of six years, occasioned in major part by the court of appeals' consideration of the government's two interlocutory appeals, deprived them of their constitutional right to a speedy trial. The court of appeals carefully considered and correctly rejected this claim (Pet. App. A8-A12).

11/ (continued)

12/ Petitioner's reliance on United States v. Kalustian, 529 F. 2d 585 (C.A. 9), is unavailaing. In United States v. Spagnuolo, supra, 549 F.2d at 710, the Ninth Circuit declared: "Kalustian teaches no more than that an affidavit composed solely of conclusions unsupported by particular facts gives no basis for a determination of compliance with the statute." As the Sixth Circuit recently has said, "What is required * * * is information about particular facts of the case at hand * * *." United States v. Landmesser, 553 F.2d 17, 20. Such information was furnished in the present case.

Most of the delay in bringing petitions to trial was occasioned by the government's interlocutory appeals, which were expressly invited by the district court (Pet. App. A28-A29) and which involved the consideration by the court of appeals of complex and novel questions with respect to the recently enacted wire interception statute (Pet. App. A10-A11). No governmental misconduct can be attributed to this delay. See Harrison v. United States, 392 U.S. 219, 221-222, n. 4; United States v. Sarvis, 523 F.2d 1177, 1183 (C.A.D.C.); United States v. Bishton, 463 F.2d 887 (C.A.D.C.). "The right of the Government to appeal decisions in the defendant's favor before jeopardy attaches is designed to protect the interest of society in lawfully prosecuting criminal offenders * * *." United States v. Bishton, supra, 463 F.2d at 890. The delay in this case resulting from the operation of the appellate process was necessary to assure careful review of important legal questions, and petitioners cannot complain of the time it took to correct erroneous district court orders that petitioners in the first instance persuaded the district court to enter.

Moreover, as the court of appeals noted (Pet. App. A11-A12), during the pre-trial period petitioners were not incarcerated in connection with this case, asserted their speedy trial rights in less than vigorous fashion, and raised no substantial claim of prejudice as a result of the delay (Pet. App. A12). In these circumstances, petitioners' claim that the delay in this case abridged their right to a speedy trial is unpersuasive.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. McCREE, JR.,
Solicitor General.

BENJAMIN R. CIVILETTI,
Assistant Attorney General.

MICHAEL W. FARRELL,
ELLIOTT SCHULDER,
Attorneys.

AUGUST 1977.